the bailor's benefit as a trustee of the possession, and binds him to perform all the terms of the bailment, precisely as equity holds the trustee of a legal title to perform all the terms of his trust.[11] If so, it ought logically to adopt the rest of the Roman doctrine of "mandate," and treat every power to act as agent as received in trust to effect the purposes for which it was conferred. But this would conflict with decisions which hold that neither the promise [12] nor the attempt [13] to carry out a transaction as agent, nor both together,[14] can create a duty to complete it. Inasmuch as either alone would, on principle, be an acceptance of the trust, the authorities must be taken as standing definitely against the suggested doctrine. It seems, therefore, that the rule of the principal case, making a gratuitous agent who begins to act liable for pure nonfeasance, while logically sound, cannot be supported on the decisions.

STATUTES AUTHORIZING ASSESSMENT OF PUNISHMENT BY THE JURY. — In several states an interesting change from the old common-law procedure has been effected by statutes which invest the jury with the judicial function of imposing sentence. In withdrawing this right from the judge, the purpose is to overcome the reluctance of juries, who, because of fear that the judicial sentence may be extreme, hesitate to convict a defendant who, they feel, deserves light punishment on account of extenuating circumstances.[1] The prisoner, particularly when he is accused of a crime against which popular indignation runs high, often prefers to plead guilty because of his belief that the trial judge will accord him a lighter penalty than would a prejudiced jury. This situation is expressly provided for in the type of statute which requires the jury in all cases to mete out the punishment,[2] and also in the statutes which expressly reserve to the court their sentencing power in case the defendant pleads guilty.[3] But there is another class of statutes which merely provides that the jury may add the prisoner's sentence to their verdict of guilty.[4] It is difficult to say whether in those jurisdictions an accused by pleading

[11] This proposition may seem novel. But if a gratuitous bailee is bound by his undertaking to feed the bailor's horse, it is difficult to see why he is not bound by other affirmative undertakings, as to transport a chattel, or present a note for payment. If the contract theory of these duties is abandoned, no alternative seems open except a "legal trust." The theory suggested seems to underly the reasoning in the following cases: Coggs *v.* Bernard, *supra*; Smith *v.* Lascelles, 2 T. R. 187, 190; Robinson *v.* Threadgill, *supra*; Boyer *v.* State Farmer's Mut. Hail Ins. Co., 86 Kan. 442, 121 Pac. 329. See also STORY, BAILMENTS, § 171.

[12] Thorne *v.* Deas, *supra*; Balfe *v.* West, 13 C. B. 466.

[13] Vickery *v.* Lanier, 1 Metc. (Ky.) 133.

[14] Morrison *v.* Orr, 13 Stew. & P. (Ala.) 49.

[1] See People *v.* Welch, 49 Cal. 174–179. An examination of the murder cases under one such statute shows this result is not always attained. As a general rule, juries under the California statute, instead of utilizing their power for the purpose of passing the light sentence on a person with some moral or other excuse, have given life imprisonment to persons who committed picturesque murders, and sentenced to death those whose methods were purely brutal. See SALEILLES, INDIVIDUALIZATION OF PUNISHMENT, Introduction to English Version by Prof. Roscoe Pound, p. xvi.

[2] Wartner *v.* State, 102 Ind. 51, 1 N. E. 65.

[3] People *v.* Noll, 20 Cal. 164.

[4] Territory *v.* Miller, 4 Dak. 173, 29 N. W. 7.

guilty can escape jury sentence. At common law if the accused pleads guilty there is no need for the verdict of the jury. It would seem, therefore, since statutes in derogation of the common law must be strictly construed, that the vesting of an extraordinary power of sentence when connected with verdict does not necessitate the exercise of such power when a verdict is not demanded.[5] A different result, however, was reached under a statute of this class in the District of Columbia. *United States* v. *Green*, 41 Wash. L. Rep. 216. This statute authorized a sentence in the crime of rape of five to thirty years by the court, but provided that the jury might add to their verdict of guilty the death sentence.[6] The accused pleaded guilty to secure the lighter punishment at the hands of the court, but was forced to submit to jury trial on the ground that a construction of the statute which would permit the fear of heavier punishment to induce a plea of guilty would be unconstitutional. The court argued that a power in the jury to impose a heavier punishment puts a penalty on pleading innocence; that it so far induces an accused to avoid trial that it impairs the right to jury trial guaranteed by the Sixth Amendment to the Constitution;[7] and that by practically compelling a man to plead guilty it would force him to be a witness against himself, contrary to the Fifth Amendment.

It is submitted, however, that there is no constitutional ground or any basis of public policy for distinguishing this statute from the general class. It is usually understood that if a man pleads guilty he will be let off with a lighter sentence, yet it has never been seriously argued that such a practice is against public policy because it places a penalty on pleading innocence. And since there is no reason to suppose that if a defendant goes to trial he will get a more severe punishment than he deserves, it is hard to see how he suffers any disadvantage because the statute attaches a possible benefit to a plea of guilty. On the same argument, since the prisoner will have full justice if he pleads not guilty, it cannot be said that the further benefit he may get through pleading guilty deprives him of free choice of jury trial under the Sixth Amendment.

The Fifth Amendment guarantees that an accused will not be forced to testify against himself. It seems clear that to refuse every plea of

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[5] Territory *v.* Miller, *supra.*

[6] CODE OF LAW, DISTRICT OF COLUMBIA, 808. "Whoever is guilty of . . . shall be imprisoned for not less than five nor more than thirty years: *Provided*, that in any case of rape, the jury may add to their verdict, if it be guilty, the words 'with the death penalty,' in which case the punishment shall be death by hanging. *Provided further*, that if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided for in this section." Though this statute is rather unusual in its provisions, its purpose would seem to be the same as in those mentioned above, since, having the death penalty solely in their hands, the jury will not hesitate in a verdict of guilty for fear of an unduly harsh sentence from the judge.

[7] U. S. CONST. AMENDMENT VI. "In criminal prosecutions the accused shall enjoy a right to a speedy and public trial by an impartial jury of the state where the crime shall have been committed," etc. This amendment applies only to trials in the federal courts. Eilenbecker *v.* Plymouth County, 134 U. S. 31, 10 Sup. Ct. 424. It is considered as qualifying and explaining Article III by enumerating the common-law rights conferred by this section. See Callan *v.* Wilson, 127 U. S. 540–549, 8 Sup. Ct. 1301–1303.

guilty induced by hope of lighter punishment on the ground that he has been forced to incriminate himself would be preposterous. It is hard to justify, then, a different result when, under a statute such as that in the principal case, a defendant is allowed to throw himself wholly on the court's mercy having no certainty that he has thereby bettered himself. It would appear, then, that the natural construction of this statute should have been adopted.[8]

LIABILITY OF PUBLIC SERVICE COMPANY FOR SERVANTS' ASSAULTS AND INSULTS PROVOKED BY THE PLAINTIFF. — A late Georgia case holds that a passenger who, by abusive language, has provoked an assault by the motorman, cannot recover damages for the assault from the railway company. *Binder* v. *Georgia Ry. & Electric Co.*, 79 S. E. 216. The Georgia rule, as the court in the principal case assumes, seems to be that insulting words justify a private individual in assaulting the insulter.[1] The general rule is *contra;*[2] hence the exact problem of the principal case could hardly arise elsewhere.[3] The case, however, has an important bearing on the mooted general question of whether a justification which would excuse a private individual will justify a breach of public duty by the company. The problem resolves itself into whether the inconvenience and peril which might result to the traveling public, in case such a justification is allowed, is overbalanced by the necessity for encouraging self-protection and allowing retaliation for insult.

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[8] The Third Article of the Constitution provides that "The trial of all crimes except in cases of impeachment, shall be by jury," etc. (applying only to federal courts. Eilenbecker *v.* Plymouth County, *supra*). It has been argued that the mandatory words in this article necessitate jury trials in all criminal cases. But the Constitution is interpreted in the light of the common law at the date of its adoption. West *v.* Gammon, 98 Fed. 420. So since at common law an accused could be sentenced by the court on a plea of guilty, under the Constitution such a sentence will stand. Territory *v.* Miller, 4 Dak. 173, 29 N. W. 7; West *v.* Gammon, 98 Fed. 426.

[1] The doubt in this matter is whether § 103 of the Georgia Penal Code, which provides that opprobrious words may be found by the jury to justify an assault, applies to civil proceedings. It has been held that it does not. Berkner *v.* Dannenberg, 116 Ga. 954, 43 S. E. 463. But other cases seem to decide that it does. See Cross *v.* Carter, 100 Ga. 632, 633, 28 S. E. 390. And see dissenting opinion of Fish, J., in Berkner *v.* Dannenberg, *supra.*

[2] Rarden *v.* Maddox, 141 Ala. 806, 39 So. 95; Goucher *v.* Jamieson, 124 Mich. 21, 82 N. W. 663. Many cases are collected in 3 Cyc. 1077, note 5.

[3] In jurisdictions where insult is deemed not to justify an assault, it is almost universally held that the insulting plaintiff can recover from the railroad company for assault by its servant. Haman *v.* Omaha Ry. Co., 35 Neb. 74, 52 N. W. 830; Williams *v.* Gill, 122 N. C. 967, 29 S. E. 879. Birmingham Ry. & Electric Co. *v.* Baird, 130 Ala. 334, 30 So. 456; Scott *v.* Central Park, etc. Ry. Co., 6 N. Y. Supp. 382, *contra*, is overruled by Weber *v.* Brooklyn, etc. R. Co., 62 N. Y. Supp. 1; and Harrison *v.* Fink, 42 Fed. 787, *contra*, is in the federal circuit court for the northern district of Georgia.

In this connection an interesting doctrine which for a time prevailed in Georgia should be noted. A line of cases denied the insulting plaintiff a recovery for the assault on the ground that he had "put the servant out of tune," and so could not hold the master when the servant "did not furnish the proper music," on the analogy that a servant who, by tampering with his master's appliances, makes them unfit for use, cannot recover if he is injured thereby. Peavy *v.* Georgia R. Co., 81 Ga. 485, 8 S. E. 70; City Electric Ry. Co. *v.* Shropshire, 101 Ga. 33, 28 S. E. 508. The only possible merit in the analogy is its picturesqueness, and the doctrine was repudiated in Mason *v.* Nashville, etc. Ry. Co., 135 Ga. 741, 70 S. E. 225.